



December 19, 2000

Mr. Mark Sokolow  
City Attorney  
City of Port Arthur  
P.O. Box 1089  
Port Arthur, Texas 77641-1089

OR2000-4764

Dear Mr. Sokolow:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 142461.

The City of Port Arthur (the "city") received a request for a specific police officer's personnel file including all negative letters, memoranda, documents relating to disciplinary actions taken, and written reprimands. You claim that the requested information is excepted from disclosure under sections 552.102, 552.114, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, we note that you ask this office to reevaluate Attorney General Opinion JC-0257. However, the Open Records Division is not the appropriate division to reevaluate an Attorney General Opinion. Therefore, we will not address your concerns regarding that opinion in this letter ruling.

Turning to the submitted documents, we find that portions fall within the purview of section 552.101 in conjunction with section 143.089 of the Local Government Code. Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 143.089 of the Local Government Code provides in pertinent part:

---

<sup>1</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). Here, we do not address any other requested records to the extent that those records contain substantially different types of information than those submitted to this office.

(a) The director [of the police officers' civil service] or the director's designee shall maintain a personnel file on each . . . police officer. The personnel file must contain *any* letter, memorandum, or document relating to:

....

(2) any misconduct by the . . . police officer if the letter, memorandum, or document is from the employing department and *if the misconduct resulted in disciplinary action by the employing department in accordance with this chapter.*

....

(g) A . . . police department may maintain a personnel file on a . . . police officer employed by the department for the department's use, but the department may not release any information contained in the department file to any agency or person requesting information relating to a . . . police officer. The department shall refer to the director or the director's designee a person or agency that requests information that is maintained in the . . . police officer's personnel file. [Emphasis added.]

In Open Records Decision No. 562 (1990), this office discussed the confidentiality of personnel file information maintained by police and fire departments in cities that have adopted the fire fighters' and police officers' civil service law in accordance with the provisions of chapter 143 of the Local Government Code. Section 143.089 of the Local Government Code provides for the creation of two personnel files for police officers: one that is maintained by the city's civil service director and the other by the city police department.

Information contained in personnel files held by the civil service director, including all records relating to misconduct by police officers that resulted in disciplinary action, as contemplated by chapter 143, must be released to the public unless the information comes within one of the Public Information Act's exceptions to required public disclosure. You inform us, however, that the records at issue here are from the personnel files held by the city police department. Moreover, you indicate that the records at issue pertain to disciplinary action other than that contemplated by chapter 143 of the Local Government Code. *See* Gov't Code § 143.089(a)(2); *see also*, Gov't Code ch. 143 subchapter D (defining disciplinary actions for the purposes of chapter 143). These records, therefore, are made

confidential under section 143.089(g) of the Local Government Code and thus may not be released to the requestor. *See also City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946 (Tex. App.--Austin 1993, writ denied).

Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, we consider whether section 552.101 in conjunction with the common law right to privacy applies to any of the submitted information.

Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information coming within the common law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85.

In Open Records Decision No. 373 (1983), we concluded that personal financial information can generally be considered highly intimate and embarrassing:

In our opinion, all financial information relating to an individual — including sources of income, salary, mortgage payments, assets, medical and utility bills, social security and veterans benefits, retirement and state assistance benefits, and credit history — ordinarily satisfies the first requirement of common law privacy, in that it constitutes highly intimate or embarrassing facts about the individual, such that its public disclosure would be highly objectionable to a person of ordinary sensibilities. . . .

However, information regarding a financial transaction between an individual and a governmental body is a matter of legitimate public interest not generally protected from public disclosure by common law privacy. Open Records Decision Nos. 590 at 3 (1991), 523 at 3-4 (1989). For example, the salary of a public employee is not excepted from disclosure. Open Records Decision No. 342 (1982). Further, the doctrine of common law privacy does not generally except from disclosure public employee participation in an insurance program that is funded wholly or partially by his or her employer. Open Records

Decision Nos. 600 at 9 (1992); *but see* Open Records Decision No. 600 at 10 (1992) (determining that information revealing the designation of beneficiaries is confidential under the right of privacy). Of course, personal financial information does not meet the test for common law privacy unless it is also of no legitimate interest to the public. In Open Records Decision No. 373 (1983), we concluded that the determination of whether the public's interest in obtaining highly intimate and embarrassing information is sufficient to justify its disclosure must be made on a case-by-case basis. We have reviewed the submitted information and marked the information and marked the portions that must be withheld under common law privacy as encompassed by sections 552.101 and 552.102.

You also claim that the submitted information contains educational records which are confidential under section 552.114. The Family Educational Rights and Privacy Act of 1974 ("FERPA") provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). This office generally applies the same analysis under section 552.114 and FERPA. Open Records Decision No. 539 (1990). Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. You argue that a college transcript contained in the submitted information is confidential under FERPA and section 552.114. However, because the city is not an educational institution, neither FERPA nor section 552.114 applies to college transcripts or other educational types of records maintained by the city. Therefore, the city may not withhold the college transcript under FERPA.

However, certain information contained in the transcript as well as in other portions of the submitted information must be withheld under Section 552.117(2). Subsection 552.117(2) provides for the confidentiality of current and former peace officers' home addresses, home telephone numbers, social security numbers, and family member information. Section 552.117(2) applies to such information regardless of whether the officers elected to have the information withheld under section 552.024. We have marked the section 552.117(2) information that appears in the submitted documents. The city must withhold this information.

In summary, the city must withhold the information that falls under section 552.101 in conjunction with section 143.089(g) of the Local Government Code. The city must withhold information we have marked as excepted from public disclosure under common law privacy

as encompassed by sections 552.101 and 552.102. The city must withhold the information we have marked as excepted from public disclosure under section 552.117(2). The city must release the remainder of the submitted information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, reading "E. Joanna Fitzgerald".

E. Joanna Fitzgerald  
Assistant Attorney General  
Open Records Division

EJF/er

Ref: ID# 142461

Encl: Submitted documents

cc: Mr. Shane Graber  
P.O. Box 3071  
Beaumont, Texas 77704  
(w/o enclosures)